or so peculiarly situated that of necessity they use railway service more than the ordinary person, is not fair. Such favoritism savors of preference shown the large shipper or the long haul. Statutes prescribing that a rate lower than the regular fare be granted to school children in riding to and from school, however, have been upheld.[10] School children travel at hours when travel is lightest; because of their small size they occupy less space than adults on the cars, and the lower rate attracts many to ride whereas otherwise they would walk.

Provided the classification is reasonable, whether under laws of this nature due process of law is accorded the railroads depends upon whether they suffer actual loss.[11] The return from the service under the reduced rate must not be considered alone but the total return under all the rates allowed by law.[12] If this falls below what the railroad may justly demand then the Fourteenth Amendment may be invoked but not otherwise.

VALIDITY OF A STATE STATUTE MAKING CRIMINAL THE ACT OF AN EMPLOYER IN OFFERING EMPLOYMENT ONLY ON CONDITION THAT THE EMPLOYEE AGREE NOT TO AFFILIATE WITH A LABOR UNION WHILE IN HIS EMPLOY.—Many of the State legislatures have made efforts, in one way or another, to restrict the freedom of contract in favor of the laborer for the avowed purpose of giving labor and capital equal advantages in driving a bargain. In many instances this legislation has been clearly and frankly in favor of the union laborer alone. Such was the case with the recently passed Kansas statute which made it criminal for an employer to require a prospective employee, as a condition of the employment, to sign an agreement not to hold membership in a labor union while in his employ. The same provision has been passed in a number of other States prior to this one, but since when tested the State courts had always held it to be a violation of the Fourteenth Amendment to the United States Constitution, it had never reached the United States Supreme Court.[1] As a decision by that tribunal

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[10] Commonwealth *v.* Interstate Consolidated R. Co., 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419, affirmed, 207 U. S. 79. Provided the question of reasonable classification is germane to the subject in cases where the railroads are required to carry militiamen at one-half the regular fare, the grounds for the distinction are not as apparent as under the statutes allowing school children a lower rate. Militiamen travel, as any other passengers, at odd times and on regular trains. They do not journey in a large body so that they require special facilities; they occupy the same space as any other passengers and no increase in their travel will result from the reduced price of passage to them.

[11] Comm. *v.* Interstate Con. St. R. Co., *supra.*

[12] Wilcox *v.* Consolidated Gas Co., *supra.*

[1] Smith *v.* Daniels, 118 Minn. 155, 136 N. W. 584; State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; People *v.* Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282; Gillespie

would settle the question authoritatively for all of the States, the final result in the recent case of *Coppage* v. *Kansas,* 35 Sup. Ct. 240, involving this statute, was looked for with no little interest. The Kansas court had upheld a conviction under the statute [2] and the case was carried to the Supreme Court on the ground that the statute violated the Fourteenth Amendment, forbidding any State to pass or enforce a law depriving any person of life, liberty or property without due process of law.

Many States have passed statutes making it criminal for an employer to discharge an employee because of membership in a labor union, and in 1898 Congress passed a law to the same effect applying to interstate railroads and their employees. These statutes have been declared unconstitutional with practical unanimity; [3] the Kansas court itself so held in a comparatively recent decision [4] and the Act of Congress was denied effect in the well-known case of *Adair* v. *United States,*[5] because it violated the Fifth Amendment to the Federal Constitution. Those who attacked the recent Kansas statute involved in the Coppage case argued that the Adair case and the other decisions should govern it. On the other hand, it was strongly contended that the two cases were to be distinguished because of vital differences, while at least one of the justices advocated overruling the Adair case. But the last-named course seems not to have been insisted upon, nor seriously considered. Hence, the first question to be decided by the court was whether the validity of the two statutes was to be governed by the same considerations—the one forbidding discharge because of union affiliations, and the other forbidding the parties' making non-membership a condition of the employment.

In regard to the first of these provisions, it is almost universally admitted that where the employment is at will, it can be terminated at any time at the whim of either party, for any cause, or for no cause whatever, and since it can be terminated by either party for any cause, it can be terminated by the employer because of the other party's affiliation with a union.[6] But it is argued that where the employee is asked to agree in advance to withdraw from his union, or not to join one, during the life of the contract, he is being asked to sign away a right which is guaranteed to him by the constitution. Inasmuch as the labor union is a legal and legitimate type of volun-

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v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; Goldfield Consol. Min. Co. *v.* Goldfield, etc., Union, 159 Fed. 500, 513.

[2] State *v.* Coppage, 87 Kan. 752, 125 Pac. 8.

[3] Coffeyville V. B. & T. Co. *v.* Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185, 1 Ann. Cas. 936; Gillespie *v.* People, *supra;* State *v.* Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934; Adair *v.* United States, 208 U. S. 161.

[4] Coffeyville V. B. & T. Co. *v.* Perry, *supra.*

[5] *Supra.*

[6] Atchison, T. & S. F. R. Co. *v.* Brown, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 13 Am. St. Rep. 213, 18 Ann. Cas. 346. See also cases cited in note 4, *supra.*

tary organization, it is doubtless admitted that he has a constitutional right to join a union, with its consent, of course. But the exercise of this right is not of such transcending importance to the State that it is against public policy to allow one of its members to forego it temporarily. Nor does the Federal Constitution guarantee its free exercise against danger from the party's own folly in signing it away, nor even against adverse acts of other individuals, but solely as against restrictive State laws. But in the instant case the party was given the choice of signing the agreement, or refusing the particular employment offered to him on that condition. But it is submitted that practically every contract, and especially every contract of service, involves the giving up of certain rights. In fact, as pointed out by Mr. Justice Pitney, it is difficult to see "how the right of making contracts can be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights." [7]

An illustration of a very common agreement to forego the exercise of such rights as a part of contracts of employment will serve to make this clearer.[8] Thus, as the court said, while everyone has a right to be idle, or to work for whomsoever he pleases, the other party being willing, yet it is an express or implied condition of every contract of employment that the employee will not be idle, and will not work for others, so long as he is in the service of his present employer. Or, to take another example more clearly analogous to the principal case, no one doubts that a religious congregation, in

[7] Coppage *v.* Kansas, 35 Sup. Ct. 240, 243 (principal case).

[8] It is submitted that the analogy which Mr. Justice Day draws between this case and the case of a State statute requiring a foreign corporation to agree not to remove a case to the Federal courts is far from being a perfect analogy. As he points out, it has been held that, though a State has the right to exclude a foreign corporation because of its thus removing a case, yet it is unconstitutional for a State to pass a law by which it refuses to admit a foreign corporation except on condition that it sign an agreement not to remove a case to the Federal courts. The following differences between the two cases might be pointed out: In the first place, the constitution gives the foreign corporation the right to remove its cases to the Federal forum, and it further, by the Fourteenth Amendment, forbids a State to pass any law depriving any person (natural or artificial) of its liberty without due process of law; but though it is a part of the employee's liberty to join a union, yet the Fourteenth Amendment does not protect this right from other individuals, for instance employers, but it protects it only from interference by State laws. Not only does this Amendment not protect the employee's right against interference by the employer, but it actually does protect the employer's freedom of contract from restrictive laws passed by the State legislature, such as is found in the Kansas statute. In addition to this strictly legal difference between the two cases, it might also be regarded as against public policy for a State arbitrarily to restrict the jurisdiction of the Federal courts, while there is no question of public policy involved in the Kansas case. For a discussion of the right of a State to prevent a foreign corporation from removing causes to the Federal courts, see 2 VA. LAW REV. 288.

employing a minister, has a right to make it a condition of the contract that he "pledge his honor"—as the Kansas court said of this case—not to join a congregation of another faith while in its employment, although that would be an act which he would have a perfect legal right to do and, in fact, is one which is most jealously guarded by our Constitutions, Declaration of Independence, and the bills of rights of practically all the States.

If in either of these cases the conditions demanded were arbitrary or had no reasonable connection with the principal contract, there might be some show of reason in forbidding such a condition, though it would be hard to justify even then. But owing to the danger of strikes and other labor troubles where union men are employed, an employer whose business would suffer greatly even from a slight cessation might reasonably consider it very essential to guard against such dangers in the very inception of the contract, rather than be forced to rely upon his undoubted right of discharge when he finds that his employee has already joined a union. At least it would seem that the apparent relation between membership in the union and the services expected is direct enough to prevent a court's saying that there is no relation at all. The strength and importance of the relation would seem to be a question for the decision of the employer and he should have the privilege of deciding whether union membership is consistent with the duties which he has a right to ask of his employee. If it be true that he should have the right to a decision of this question, it is certainly of the utmost importance that every consideration of honest dealing demands that the question be settled at the inception of the contract, rather than that this important condition be kept concealed and the workman be dismissed summarily after having joined a union. The first course seems to be the fairer to both parties and decidedly the more favorable to the employee. But whichever the employee may consider more favorable to himself, the Supreme Court comes to this conclusion: "that under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from *Adair* v. *United States*." [9]

After reaching the conclusion that there is no distinction between the two cases, the court proceeds, as it says, "to restate the grounds upon which the first decision rests." It is, of course, fundamental that the United States Constitution forbids any State to deny to any person life, liberty or property without due process of law. Included in the right of personal liberty and the right of private property, is the right to make contracts for the acquisition of property. It is probably true that of all the contracts thus protected the one which has the most personal relation to the greatest number of men

[9] Coppage *v.* Kansas, 35 Sup. Ct. 240, 243 (principal case).

and which should be most adequately protected is the contract of personal employment. But however sacred the right of contract is, the courts have construed it to be always subject to the police power of the State, [10] and this is the only way in which any such interference with this freedom as is found in this statute is to be justified.

The courts have declined to outline the precise limits of this vague attribute of sovereignty known as the police power, since "it is always easier to determine whether a particular case comes within the scope of the power than to give an abstract definition of the power itself which will be in all respects accurate." [11] There is an ever-lurking danger to the rights and liberties of the citizen in the application of the very loose terms often used to describe its scope. Even where it is properly limited and defined, it is so far-reaching and powerful as against the rights guaranteed by the Constitution, that its enlargement, by loose application of the term to legislation with which it has no real relation, constitutes a very serious menace to guaranteed personal freedom and cherished rights. The courts have agreed that beyond the fundamental exercise of this power for the preservation of the State itself it may further properly be exercised for preserving the public health, safety, morals, or the general welfare, and that for the purposes indicated, police regulations may limit to a reasonable degree the personal freedom of the individual, which includes the freedom of contract.[12] Of the laws which have been upheld as an exercise of the police power, though restricting freedom of contract, there are numerous illustrations. Thus, laws limiting the hours of labor in dangerous employments,[13] and laws limiting the hours of labor of women [14] have been upheld as protecting the public health; a statute prohibiting the sale of lottery tickets has been upheld as protecting the public morals; [15] a recent statute requiring State banking corporations to contribute to a deposit guaranty fund has been upheld as a measure reasonably restricting freedom of contract in protection of the public welfare.[16] There are various other statutes which have been attacked on this same ground and declared valid in spite of such restriction, but in every one of them the restrictive regulations have been such as could fairly be deemed necessary to secure some object directly affecting the preservation of the public health, safety, morals or welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered. In fact the Supreme Court has always been reluctant to invalidate State legislation unless there be a very flagrant violation of the constitution,

[10] Allgeyer *v.* Louisiana, 165 U. S. 578; Frisbie *v.* United States, 157 U. S. 165.

[11] Stone *v.* Mississippi, 101 U. S. 814, 818.

[12] Chicago, B. & Q. R. R. Co. *v.* McGuire, 219 U. S. 549; Holden *v.* Hardy, 169 U. S. 366; Stone *v.* Mississippi, *supra.*

[13] Holden *v.* Hardy, *supra.*

[14] Muller *v.* Oregon, 208 U. S. 412. For a discussion of the validity of laws limiting the hours of labor, see 2 VA. LAW REV. 212.

[15] Stone *v.* Mississippi, *supra.*

[16] Noble State Bank *v.* Haskell, 219 U. S. 104.

since the question of what is conducive to the highest public welfare is first of all a matter of legislative judgment, and the scope of the judicial review is confined to the actual power of the legislature and does not extend to a consideration of the wisdom or sound policy of the regulations.[17]

This course the court pursued in the instant case and sought to find some justification for the drastic statute involved. But it took the view that though the professed purpose of the statute was to protect employees from oppression and coercion, this was not the actual effect of its operation, particularly as applied by the Kansas courts in the present case. This was made clear by the fact that an employer was subjected to the same penalty for merely offering a prospective employee a free choice to sign the agreement or refuse the employment as he would be subject to were he actually to coerce him into signing it by the most oppressive practices. Hence the court was justified in going below the declared purpose of the statute and examining into its actual operation.

After disposing of the question of coercion the court seeks to find some other exercise of the police power in the statute. While it has long been settled that the labor union is a legal voluntary organization, no reason can be suggested why it of all voluntary associations should be singled out as the object of the law's special favor, at the expense both of the employer and of workmen who are not unionists. For it must be remembered that there is often more bitter strife between unionist and non-unionist than between unionist and employer, and the non-unionist has as much claim to protection by the State as his fellow workman. As is well said, "the labor unions are not public institutions, charged by law with public or governmental duties, such as would render a maintenance of their membership a matter of direct concern to the public welfare." [18]

How then can such restrictive legislation be brought within the police power? The Kansas court took the position that such legislation was justified in order to make employees as independent in the making of labor contracts as is the employer; in other words, to smooth down the inequalities between them. But, as pointed out by Mr. Justice Pitney, it is evident that these inequalities are to a certain extent inevitable under any system of private property and unless all property is held in common they spring up from the inherent difference in the skill and capacity of different men. Under our theory of government it is no part of the function of the State to equalize men's fortunes and such an object cannot be justified as being in behalf of the general welfare. What our whole system of government aims at in this sphere is to guarantee as far as possible the normal exercise of freedom of contract and other rights of property and these can be interfered with only when reasonably necessary to the carrying out of some paramount purpose which

[17] Erie R. Co. *v.* Williams, 233 U. S. 685; Chicago, B. & Q. R. R. Co. *v.* McGuire, *supra;* Holden *v.* Hardy, *supra.*

[18] Coppage *v.* Kansas, 35 Sup. Ct. 240, 244 (principal case).

concerns public welfare. But in passing this statute the legislature had no such purpose in view; the avowed purpose—as set out by the Kansas court—was directly to destroy freedom of contract, not as a means, but as an end in itself. It seems too clear for argument that it is beyond the power of any body in the State, or of any State, by one direct blow practically to nullify in certain spheres this important provision of our fundamental law; and thus blot out for a part of its citizens a right which has been cherished since the founding of the nation. The original proposal of Nullification was aimed only at acts of Congress, but the advocates of this doctrine are far bolder and seek to nullify the constitution itself.

If the fact that such legislation was passed by a State may be taken to raise any problem for solution, the Kansas court seems inadvertently to have furnished the key to the situation in the following words: "If experience and changed conditions demonstrate that the constitutional limitations work or permit injustice, there is still a remedy, but it is not in the courts." [19] If there is a popular belief in a socialistic form of government which demands a complete surrender of individual liberty, and this belief is strong enough and general enough to induce the people to turn over their liberty to the legislature, then there will be ample authority for equalizing legislation, and the courts will have to enforce it. But until the constitution is amended in accordance with this socialistic theory, the present theory of government, which has dominated it since the beginning, must control, and it is the highest duty of the American courts to enforce its limitations against the encroachments of the legislatures, both State and national. For "while the judiciary is not the guardian of civil rights or liberty in the abstract, it is the guardian of so much thereof as by constitutional restrictions the government is forbidden to disturb."

In taking this view of the question there is not, and there is not intended to be, any hostility or ill-will toward workingmen or labor organizations. In considering legislation of this kind it is always of prime importance to keep in mind the fact that the situation presented is probably a transitory one, and that almost over-night the courts are liable to be confronted with a statute imposing a similar criminal liability on the unionist in favor of the employer, or in favor of the non-unionist. If the power of the State to pass this restrictive legislation be sustained, it is obvious that the question whether the one class or the other would be bearing the burden at any one time would depend merely on which of the classes had the upper hand in the government at that particular time. Thus, if such laws were sustained soon there would probably be legislation in some States forbidding an employee to make it a condition of his employment that the employer not join a blacklisting organization, or that he not employ union men. Such legislation would not only be possible but probable in States where the unionists have the least influence in politics. But each kind of legislation is equally odious

[19] State *v.* Coppage, 87 Kan. 752, 125 Pac. 8, 10.

to the believer in democratic government, and the only safe guarantee against both would seem to be a continuance of the present policy of equal rights under the law and of full liberty to each one to sell and buy labor to and from whom he will.

THE RIGHT OF A GUARDIAN TO CHANGE THE NATIONAL OR QUASI-NATIONAL DOMICIL OF A LUNATIC.—The question of the power of a lunatic's committee to change the national or quasi-national domicil of his ward has never been authoritatively decided by the courts. On principal, there seems to have been two views advanced.[1] One view holds that after adjudication of lunacy and the appointment of a committee, the committee has absolute control of the ward's domicil, similar to the control of the ward's person and property, allowing the committee or guardian full discretion; in fact, substituting the will of the committee for the will of the ward in the selection or retention of the ward's domicil. Adherence to this view, would, of course, give the committee power to change the ward's national or quasi-national domicil. There seems to be no cases on this subject but the objection to this view is the same that applies to infants in that it puts in the hands of the committee the power of changing, by a change of domicil, the succession to the ward's property, a power not fully guarded by the mere requirement of good faith,[2] or by reason of the loss of power by the committee attendant upon a change of jurisdiction.[3] The other view, which is better on reason and principle, is that upon the losing by the lunatic of that degree of mentality necessary to choose a domicil, his national or quasi-national domicil becomes fixed perma-

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[1] MINOR, CONFLICT OF LAWS, 108; DICEY, CONFL. LAWS, 142.

[2] Wheeler *v.* Hollis, 19 Tex. 522, 70 Am. Dec. 363. Authority for denying a guardian the power of changing the domicil of his infant ward for the purposes of changing the succession to the ward's property. This requirement has been attacked (MINOR, CONFLICT OF LAWS, 83), in that it would be against public policy to allow the infant to be separated from its family, by refusing to allow its domicil to change with that of its guardian; but it would seem that this reasoning does not apply to lunatics.

[3] In regard to comity, see In re Curtis, 199 N. Y. 36, 92 N. E. 396, Haight, J.: "And while the committee of an incompetent appointed by the court of a State in which he had his domicil, has no authority over the person or property in another State, except such as is permitted by comity, in this State the conservator appointed by a foreign jurisdiction may, upon application to our courts, have jurisdiction extended to the property of the incompetent in this State; and it a committee of a lunatic appointed in a foreign State should bring his incompetent in this State for medical treatment, education, pleasure or convenience, temporarily, we should not think of interfering with the custody, control or management of the committee of the person under his charge so long as he does not resort to unnecessary or criminal violence." It should be observed that the appointment of guardians is usually governed by the statute law of each State.